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No. _____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NORTH AMERICAN SOCCER LEAGUE, ET AL.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

NORTH AMERICAN SOCCER LEAGUE PLAYERS ASSOCIATION,
Respondent.

BRIEF OF NASLPA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The North American Soccer League Players Association (hereinafter "NASLPA" or "Union") files this brief in opposition to the Petition for Writ of Certiorari filed by the Petitioners, the North American Soccer League and Its Constituent Member Clubs, on July 11, 1980. The Petitioners' Petition prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 21, 1980. *NASL* v. *NLRB,* 613 F.2d 1379 (5th Cir. 1980). That judgment, resulting from a unanimous

decision of the Circuit Court, ordered enforcement of an order of the National Labor Relations Board directing the Petitioners to bargain with the NASLPA as a joint employer. The NASLPA was the original charging party in the underlying case, and is an Intervenor herein by virtue of the granting of a Motion to Intervene by the Circuit Court on August 13, 1979.

I. SUMMARY OF ARGUMENT

The Petitioners contend in their Brief to this Court that the National Labor Relations Board acted improperly in finding that a joint employer relationship existed between and among the Constituent Member Clubs of the North American Soccer League and the League itself. The predominant theme of their argument is that business entities interrelated through a "franchise" system cannot and should not be considered as employers of each others' employees. It is misleading and inappropriate, however, to compare the NASL to other franchise businesses, since the League is a creation of the clubs and it exists solely for their benefit.

The Petitioners' contention that the NLRB failed to follow or distinguish its own precedent in the case below is invalid. The Board's decision is totally consistent with its past "joint employer" decisions, including those relied on by Petitioners.

We fully concur with Petitioners' statement that the existence of a "community of interest" among the players is essential for a bargaining unit determination. However, the record shows that the players' "community of interest" is much more apparent on a League-wide basis as compared to the individual club basis propounded by Petitioners.

The Petitioners have misrepresented certain alleged facts in their Brief. Although these assertions are outside the record and cannot be considered, three of them must be answered. Contrary to the implication of an alleged quote attributed by Petitioners to the late George Meany in a footnote to their Brief, Mr. Meany and the AFL-CIO have welcomed the North American Soccer League Players Association into the ranks of the federation as an affiliate. Further, Petitioners are incorrect in citing a supposed paradox between the basis for the Board's findings in this case and the contentions expressed in a pending anti-trust action brought by players against the NASL. Finally, the Petitioners' reference to a confidential union memorandum dated in April of 1980 was totally improper.

The Petition for Writ of Certiorari should be denied.

II. ARGUMENT

The North American Soccer League Players Association supports and is in full concurrence with the contentions and positions expressed in the Brief in Opposition filed herein by the Respondent National Labor Relations Board. This Brief is filed, however, in an effort to supplement the Board's Brief in the areas discussed below.

A. The Petitioners' Reliance On The Supposed Franchisor/Franchisee Relationship Between The League And The Clubs Is Entirely Misplaced

The predominant theme of the Petitioners' Brief is that a joint employer relationship cannot and should not be imposed by the Board upon business entities which

are interrelated through a "franchise" system. In an apparent effort to pose "an important question of federal law" for this Court where no such question really exists, the Petitioners describe the Circuit Court's judgment as follows:

> "The case is wholly without precedent and involves issues that have far-reaching implications, not only for professional sports franchises such as those operated by these Petitioners, but also for a *vast number of other employers who operate individual businesses as part of a franchise system* which requires them to adhere to the uniform standards that are *sine qua non* of a franchise.[1] (Emphasis supplied).

They later cite as error the Circuit Court's reliance on *Boire* v. *Greyhound Corporation,* 376 U.S. 473, 84 S. Ct. 894 (1964), contending that *Boire* ". . . does not stand for the principle that multiple franchisees together with their franchisor may be required to bargain jointly . . .,"[2] and argue that the supposed franchise relationship between the League (franchisor) and the individual clubs (franchisees) should somehow compel a different result. The Petitioners conclude their Brief by citing "drastic implications" from the Circuit Court's decision, which they interpret as making McDonalds, Midas, 7-Eleven, and "thousands" of other franchisors and franchisees bargain as joint employers of each others' employees.[3]

It is entirely misleading and inappropriate, however, to compare the North American Soccer League and its Constituent Member Clubs to McDonalds, 7-Eleven, or

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[1] Petitioners' Brief at pp. 5-6.

[2] *Id.* at pp. 10-11.

[3] *Id.* at p. 28.

any other "franchise" system. Unlike McDonalds or 7-Eleven, the entity known as the North American Soccer League is inseparable from the collective identity of its member clubs. The League is a creation of the clubs, and it exists *solely* for their benefit. It is run by a Board of Directors consisting of a representative of each club,[4] and its club-elected Commissioner, who presides over a system in which the clubs share television and radio revenues,[5] transportation expenses, and gate receipts.[6] In addition, the clubs control the composition of the League by Constitutional provisions which require a three-fourths vote of the clubs for approval of new memberships in the League ("expansion"), the transfer of an existing club from one geographical location to another, and the termination of an existing club's membership.[7]

The contrast is obvious. The various McDonald's franchisees do not own the McDonald's Corporation or comprise its Board of Directors. They do not select its chief executive officer or share its revenues, and they do not collectively determine or select the ownership or location of new franchises. In the NASL, the individual clubs effectively *are* the League, and the League is the vehicle through which the clubs collectively impose a common draft, a Club-Player Agreement, a "waiver system," player-disciplinary powers of the Commissioner, and other conditions which affect and control the wages, hours, and working conditions of the players.

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[4] *See* NASL Constitution (Pet. Ex. 6), Article IV.

[5] *Id.*, Sections 13.5, 13.6.

[6] *See* NASL Regulations (Pet. Exh. 7), 6.17, 6.3(a).

[7] *See* NASL Constitution (Pet. Exh. 6), Article VIII.

B. The Board Properly Followed, Rather Than Ignored, Its Own Precedent

The Petitioners characterize the Board's decision in this case as ". . . an aberration without foundation," and contend that the Board ". . . simply ignored its own precedent" by ruling that the NASL and its Constituent Member Clubs constituted a joint employer in a League-wide unit.[4] They cite two previous Board decisions where the Board declined to link separate employers into a joint-employer relationship, *Greenhoot, Inc.*, 205 NLRB 250 (1972) and *Greater Houston Transportation Co.*, 208 NLRB 1020 (1974), and contend they constitute a precedent which should control in the present case.

In so arguing, however, the Petitioners again ignore a critical distinction between the North American Soccer League and the companies in question in those cases. In *Greenhoot,* the question was whether a private company (Greenhoot) engaged in the business of managing and maintaining various buildings had a joint employer relationship with 14 separate building owners who had contracted for Greenhoot's services. The Board found that Greenhoot was a separate joint employer with *each* of the building owners, but declined to hold that the various building owners constituted a joint employer along with Greenhoot of all of the employees in the proposed unit.

In *Greater Houston Transportation Co.,* the Board found that a company operating a centralized and integrated radio dispatch service for holders of separate taxi cab franchises was not a joint employer with the franchise holders of the various employees in the proposed unit. The Petitioners incorrectly characterized this

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[4] Petitioners' Brief, p. 21.

company as a "cab association" in their Brief,[9] since it was in reality a *separate* company providing various services to the cab franchisees in return for the payment of fees. In any event, three of the Board members found (with two members dissenting) that there were insufficient facts to establish that this company was an employer, since it had ". . . no voice or control over wages, hours, and working conditions established by the franchisees and independents."[10]

In the instant case, the NASL and its clubs cannot claim that the League is analogous to the maintenance company in *Greenhoot*. That company was an entirely separate and distinct entity owned by a third party in business to provide a service to the named respondents and other companies and individuals. In the case at bar, the League is created, organized, controlled, and maintained by the NASL clubs exclusively for their own benefit. It is *not* a private company that happens to have the individual clubs as customers. It is instead a vehicle through which the clubs collectively exercise substantial control over the wages, hours and working conditions of players. Surely, if the building owners in *Greenhoot* had an equal ownership interest in the maintenance company and thereby controlled the business the way the NASL clubs control the NASL, the Board would have considered them to constitute a joint employer as well.

Nor can the Petitioners validly claim that the League should be viewed in the same manner as the dispatch service in *Greater Houston Transportation Co.*,

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[9] Petitioners' Brief at p. 18.

[10] *Greater Houston Transportation Co.*, 208 NLRB 1020, 1022 (1974).

supra. That company was again a distinct entity owned by a third party and not controlled by the franchisees. Moreover, the Board found in that case that the company's services did not pertain to the conduct of labor relations, and that it had no control over the selection of employees, their compensation, or their working conditions.[11]

Quite the opposite is true in the present case. Through the League, the clubs require every player to sign a standard Club-Player Agreement,[12] which has standard provisions governing how and when a player is paid, the nature of his services, the arbitration of his grievances, and numerous other working conditions. The League Commissioner, in turn, has authority, on behalf of all clubs in the League, to disapprove any contract if it does not meet all of the League-imposed requirements.[13] If these rules are "merely record-keeping devices to insure that two clubs do not sign the same player," as Petitioners state in their Brief,[14] why would the standard form contain some four pages of provisions outlining player working conditions? If the waiver system truly was just an ". . . administrative process through which League members buy or sell player contracts . . .,"[15] why should the player be bound by the unilateral assignment of his contract if he is claimed and awarded through waivers to another club, without even being able to re-negotiate his salary?[16]

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[11] *Greater Houston Transportation Company*, 208 NLRB 1020, 1022 (1974).

[12] Pet. Exh. 5.

[13] *Id.* at Section 10.1.

[14] Petitioners' Brief at p. 17.

[15] Petitioners' Brief at p. 17.

[16] *See* NASL Regulations (Pet. Exh. 7), Article III; Uniform Player Agreement (Pet. Exh. 5), Section 4.

In short, the Board's decision in this case was entirely consistent with its past "joint employer" decisions, *Greenhoot* and *Greater Houston Transportation Company* included.

C. A League-Wide Bargaining Unit Is Essential To Protect The Players' Section 7 Rights

The Petitioners correctly state that the essential element in a bargaining unit determination is whether a "community of interest" exists among the employees in question. However, they are totally incorrect in stating[17] that there was no basis in this case for finding that players in the North American Soccer League have a "community of interest" on a league-wide basis.

It is unquestioned that the purpose for inquiring as to unit members' "community of interest" is to insure that the employees in question will have their fullest possible freedom in exercising rights guaranteed by Section 7 of the National Labor Relations Act. We submit that the Section 7 rights of NASL players would essentially be *defeated* if they were forced to bargain on an individual team basis, and the Board and the Fifth Circuit have both agreed in their respective rulings below. The record clearly shows that all players must sign a standard contract which provides that they can be traded to another NASL team at any time, subject to the Commissioner's approval. It further shows that all players are bound by the League Commissioner's disciplinary authority, and are subject to a League-wide waiver system which subjects them to assignment to another club at any time. The League and its Commissioner control the schedule of games that players play,[18]

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[17] Petitioners' Brief at p. 26.

[18] NASL Regulations (Pet. Ex. 7), Section 6.1.

determine players' post-season compensation,[19] and enforce the collective will of the clubs as it pertains to *all* players in the League.

In view of these League-wide restrictions and requirements for players, how could the Union meaningfully bargain with an *individual* club concerning the college draft, the uniform Club-Player Agreement, post-season compensation, the waiver system, and the Commissioner's authority over players? How could an individual club bargain on these matters without violating League-wide agreements and rules?

While it may be true, as the Petitioners state,[20] that players have a real "community of interest" with other players on their club, this "community of interest" can abruptly end at the mere whim of the club if the coach decides to trade or waive the player to another team, or if the League Commissioner, in the exercise of his disciplinary authority, prevents the player from playing in the NASL.[21]

The inescapable conclusion is that the only relevant and meaningful "mutuality of interest" in the NASL is that which is shared by players on a League-wide basis. The controlling standard for review of the Board's unit determination was established by this Court in *Packard Motor Co.* v. *NLRB.* 330 U.S. 485, 491 (1947), where the Court ruled that an NLRB unit decision ". . . if not final, is rarely to be disturbed" and should not be overturned unless found to be "unreasonable and arbitrary." It is clear that the Board's unit determination in the present case was not unreasonable or ar-

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[19] *Id.* at Article VII.

[20] Petitioners' Brief at p. 27.

[21] *See* NASL Constitution (Pet. Ex. 6), Article X; Uniform Player Agreement (Pet. Ex. 5), Section 5.1.

bitrary, and it should not be disturbed by granting the Petition herein.

D. The Petitioners Have Misrepresented Material Facts In Their Brief

The Petitioners' Brief makes certain representations to this Court which distort or misrepresent the truth. While most rely on "evidence" which is outside the record, and can therefore not be considered, we are compelled to respond to three statements.

1. AFL-CIO

In their effort to convince the Court that the "soccer business" is supposedly different then the businesses which the Board was created to regulate, the Petitioners resort to a newspaper article from the *Milwaukee Sentinel* which quotes the late George Meany as characterizing athletes' unionization efforts as "fatheaded" and inappropriate in professional sports.[22] The statement was allegedly made by Mr. Meany in 1966, some fourteen years ago.

Prior to Mr. Meany's death earlier this year, the North American Soccer League Players Association, under the auspices of the Federation of Professional Athletes, became formally affiliated with the AFL-CIO by unanimous vote of its Executive Council. It was the last affiliate welcomed into the federation by Mr. Meany before his death.

2. Class action proceeding

The Petitioners again strayed outside the record by citing a supposed paradox between the bases for the

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[22] Petitioners' Brief at p. 5, footnote 8.

Board unit determination in this case and an anti-trust civil action pending in district court in Minnesota which challenges the League's draft and waiver system, and other restrictions as violations of the Sherman Act.[23] They then misrepresent to this Court that the plaintiffs in that case constitute the same group of persons as are contained in the bargaining unit certified in the case below, and further imply that the NASLPA is involved in that proceeding.

To the contrary, that case, entitled *Kerr, et al* v. *North American Soccer League, et al,* Civil Action No. 4-78-560 (D. Minn., 4th Div.), is a class action brought by several current *and* former NASL players, the latter category being no longer included in the Union's bargaining unit. Moreover, the NASLPA is not a party to that proceeding, and the Petitioners' attempts to have the NASLPA joined as a party have been denied by the District Court Judge in that case.

3. Confidential memorandum

Citing the "possible implications" of the decision below in this case, the Petitioners refer in their Brief to a memorandum from attorney Edward R. Garvey to the NASLPA Board of Player Representatives dated April 5, 1980.[24] Petitioners have not only gone totally outside the record in citing this document, but have done so in outright defiance of applicable rules of evidence. This memorandum was a confidential communication between a lawyer and his client provided within the context of pending litigation. It was therefore privileged under the Federal Rules of Civil Procedure, which state that

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[23] *Id.* at p. 15.

[24] Petitioners' Brief at p. 28, footnote 40.

"the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[25]

III. CONCLUSION

For the reasons stated herein and in the Brief of Respondent NLRB, the Intervenor respectively prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[25] FED. R. CIV. P. 26(b)(3).